

Entered on Docket  
September 22, 2005  
GLORIA L. FRANKLIN, CLERK  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA



Signed: September 21, 2005

  
LESLIE TCHAIKOVSKY  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re No. 04-41044 T  
QMECT, INC., Chapter 11  
Debtor.

THE OFFICIAL UNSECURED CREDITORS A.P. No. 04-4189 AT  
COMMITTEE FOR QMECT, INC.,

Plaintiff,

vs.

ELECTROCHEM FUNDING, LLC and  
BURLINGAME CAPITAL PARTNERS II,  
L.P.,

Defendants.

**MEMORANDUM OF DECISION**

In the above-captioned adversary proceeding, the Official Unsecured Creditors' Committee (the "Committee") for Qmect, Inc. (the "Debtor"), the above-captioned chapter 11 debtor, seeks to determine the validity, priority, and extent of the liens on the Debtor's property asserted by defendants Electrochem Funding, LLC ("Burlingame Funding") and Burlingame Capital Partners II, LP

1 ("Burlingame") (collectively the "Lenders"). In the complaint (the  
2 "Complaint"), the Committee alleges various defects or limitations  
3 on the liens asserted by the Lenders. In February 2005, the  
4 Committee filed a motion for summary adjudication of certain  
5 issues raised by the Complaint (the "Committee's Motion"). The  
6 Lenders filed an opposition and cross-motion for summary  
7 adjudication (the "Lenders' Cross-Motion"). The Committee's  
8 Motion and the Lenders' Cross-Motion were fully briefed and were  
9 argued to the Court on May 6, 2005. At the end of the hearing,  
10 the Court took the motions under submission. The Court's  
11 conclusions with respect to the Committee's Motion are set forth  
12 in Section A below. The Court's conclusions with respect to the  
13 Lenders' Cross-Motion are set forth in Section B below.

14 **A. COMMITTEE'S MOTION**

15 The Committee's Motion asks the Court for a summary  
16 adjudication of the following issues:

17 1. That the Lost Note and the Revolving Note are not cross-  
18 collateralized by the Comerica Deed of Trust.<sup>1</sup>

19 2. That Burlingame Funding has released its lien on certain  
20 equipment essential to the operation of the Debtor's business.

21 3. That neither of the Lenders has a lien upon the Debtor's  
22 bank deposit accounts.

23 4. That neither of the Lenders has a perfected security  
24 interest in the Debtor's delivery trucks.

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26 <sup>1</sup>The terms used in this summary of the issues are explained  
more fully in the subsection discussing the particular issue.

1       5. That the liens created on the Debtor's real property (the  
2 "Real Property") by the Lenders' deeds of trust are junior to the  
3 Alameda County real property tax lien (the "Real Property Tax  
4 Lien").

5       6. That General Electric Capital Corporation's ("GECC")  
6 security interest in the Debtor's grid flooring and other fixtures  
7 is senior to the Lenders' liens.

8       7. That Burlingame Funding does not hold a blanket lien on  
9 the Debtor's assets.

10       8. That Burlingame Funding may not enforce the Lost Note  
11 against the Debtor.

12       9. That Burlingame Funding cannot produce sufficient evidence  
13 to prove its claim pursuant to the Revolving Note.

14       10. That Burlingame cannot produce sufficient evidence to  
15 prove its claim.

16       11. That Burlingame's security interest is undersecured.

17  
18       Each of these issues and the Court's rulings with respect to them  
19 are discussed below.

20       **1. Lost Note and Revolving Note Are Not Cross-Collateralized by**  
21       **Burlingame Funding's Deed of Trust**

22       On or about December 17, 1998, the Koelling-McNeill  
23 Partnership (the "Partnership") executed a promissory note in  
24 favor of Comerica Bank-California, now known as Comerica Bank  
25 ("Comerica") in the principal amount of \$937,500. (This is the  
26 note referred to herein as the "Lost Note.") On or about February

1       5, 2004, Comerica assigned the Lost Note, among other things, to  
2 Burlingame. Shortly thereafter, Burlingame assigned the Lost  
3 Note, among other things, to Burlingame Funding, a newly created  
4 affiliate of Burlingame. The Committee refers to this note as the  
5 Lost Note because Comerica never delivered the original promissory  
6 note to Burlingame, and thus Burlingame was unable deliver the  
7 original to Burlingame Funding. To date, no one has been able to  
8 produce the original promissory note.<sup>2</sup>

9       On or about April 24, 2002, the Debtor executed a promissory  
10 note in favor of Comerica in the principal amount of \$900,000 (the  
11 "Revolving Note"). Comerica also assigned the Revolving Note to  
12 Burlingame in early 2004, and, shortly thereafter, Burlingame  
13 assigned it to Burlingame Funding.<sup>3</sup>

14       The Committee asserts that the Lost Note and the Revolving  
15 Note are not cross-collateralized by the deed of trust in favor of  
16 Comerica, now held by Burlingame Funding (the "Comerica Deed of  
17 Trust"). The Lenders concede this issue. In reply, the Committee  
18 asks the Court to summarily adjudicate this issue. Since this  
19 issue is not in dispute, the Court will grant its request.

20 **2. Burlingame Funding's Lien Releases**

21       The Committee notes that Burlingame Funding asserts a first  
22 priority "blanket lien" on all of the Debtor's property. It  
23 observes that Burlingame Funding executed and filed with the

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25       <sup>2</sup>The Lenders refer to the Lost Note as the Second Note.

26       <sup>3</sup>The Lenders refer to the Revolving Note as the Fourth  
Note.

1 California Secretary of State's Office a series of Uniform  
2 Commercial Code ("UCC") lien releases, releasing any liens in  
3 certain equipment owned or used by the Debtor: i.e., an industrial  
4 air exhaust system, a reverse osmosis water filtration system, a  
5 stainless parts drying assembly, three heat exchangers, an Uplast  
6 ventilator, thirty National Instrument network modules, and  
7 various wall units, base cabinets and cabinet countertops (the  
8 "Released Equipment"). The Committee asserts that the Released  
9 Equipment is essential to the Debtor's business operations and  
10 that, because Burlingame Funding does not have a lien on them, it  
11 does not have a "blanket lien" on the Debtor's assets. The  
12 Committee seeks summary adjudication on this issue.

13 Burlingame Funding concedes that it does not hold a lien on  
14 the Released Equipment but disputes that this deprives it of its  
15 "blanket lien." It asserts that the Released Equipment is all  
16 leased equipment and thus is not part of the Debtor's assets.  
17 However, it does assert a security interest in the related leases  
18 as contract rights. Burlingame Funding contends that the Court  
19 has already ruled that it is entitled to a "blanket lien" even if  
20 the lien does not extend to the Debtor's leased equipment.

21 Burlingame Funding also notes that the Committee asserts that  
22 some of the leases are not "true leases." To the extent this  
23 assertion is correct, it concedes that it does not have a lien on  
24 the equipment covered by the leases unless the equipment qualifies  
25 as a "fixture" and thus part of the Real Property, in which  
26 Burlingame Funding does assert a security interest. As the holder

1 of a lien on the Real Property, Burlingame Funding contends, it  
2 would have a right to reinstate any default by the Debtor on the  
3 relevant leases or to redeem the equipment by paying the secured  
4 debt in full. In support of these contentions, Burlingame Funding  
5 cites Cal. Civ. Code § 2924c and Cal. Comm. Code § 9623(a).

6 In reply, the Committee limits its summary adjudication  
7 request to a ruling that Burlingame Funding does not have a  
8 security interest in the leased equipment if the leases are "true  
9 leases" although it does have a lien on the leases as contract  
10 rights. The Court will grant this request.

11 **3. Debtor's Bank Deposit Accounts**

12 The Committee also contends that the Lenders do not have a  
13 "blanket lien" on the Debtor's assets because they do not have  
14 perfected liens on the Debtor's bank accounts. It notes that, to  
15 perfect a security interest in a deposit account, a secured  
16 creditor must have a "control agreement" with respect to the  
17 account. See Cal. Comm. Code §§ 9312(b)(1) and 9314.

18 The Lenders concede that they do not have a lien on the  
19 Debtor's bank accounts. However, they note that they do assert  
20 liens on the funds held in those accounts as the proceeds of their  
21 security interests in the Debtor's other assets. For this reason,  
22 they contend that their lack of a lien on the deposit accounts  
23 does not deprive them of their claim to a blanket lien. In reply,  
24 the Committee asks the Court to summarily adjudicate only that the  
25  
26

1 Lenders do not have a security interest in the Debtor's deposit  
2 accounts. The Court will grant this request.<sup>4</sup>  
3

4 **4. Debtor's Delivery Trucks**

5 The Committee asserts that, on the petition date, the Debtor  
6 owned two delivery trucks. Both vehicles were being driven, and  
7 thus certificates of title had been issued by the California  
8 Department of Motor Vehicles (the "DMV"). The Committee notes  
9 that filing a UCC-1 financing statement is not sufficient to  
10 perfect a security interest in a vehicle covered by a certificate  
11 of title. The lien can only be perfected by having the lien noted  
12 on the original certificate of title. See Cal. Comm. Code § 9337.  
13 It contends that neither of the Lenders is noted as a lienholder  
14 on the certificates of title for the two vehicles.

15 The Lenders concede that they do not have a perfected security  
16 interest in the Debtor's two delivery trucks. In reply, the  
17 Committee asks the Court to summarily adjudicate that the Lenders  
18

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19 <sup>4</sup>The Committee notes that it disputes the Lenders'  
20 contention that they have a security interest in the funds in  
21 the Debtor's deposit accounts as the proceeds of their other  
22 collateral. They note that Cal. Comm. Code §§ 9315(b)(2) and  
23 9315(d)(1) require the Lenders to trace the fund in the accounts  
24 back to their collateral. They have not done so to date.  
25 Moreover, even if they are able to do so, their security  
26 interests may be avoidable under 11 U.S.C. § 544. The Committee also notes that Cal. Comm. Code § 9315 makes the Lenders' claim junior to the rights of a transferee of money or funds from the account. According to the Committee, under 11 U.S.C. § 544, the Debtor has the same rights as a hypothetical transferee. The Court makes no ruling with respect to these contentions.

1 do not have a security interest in the Debtor's two delivery  
2 trucks. The Court will grant this request.  
3  
4

5 **5. Priority of Lenders' Deeds of Trust Vis-a-Vis Real Property  
6 Tax Lien**

7 The Committee notes that, in California, real property taxes  
8 are automatically secured by a lien on the real property that is  
9 senior to any deeds of trust, no matter when the deeds of trust  
10 were recorded. It notes that, on the petition date, the Real  
11 Property was subject to a real property tax lien in the  
12 approximate amount of \$114,439.

13 The Lenders challenge this contention on the ground that the  
14 Committee has failed to cite the relevant statute. However, the  
15 Lenders contend that, regardless of any senior real property tax  
16 liens, their deed of trust liens are still valid and give them a  
17 right of reinstatement and redemption. See Cal. Civ. Code §  
18 2924c; Cal. Comm. Code § 9623(a).

19 In reply, the Committee cites Cal. Rev. & Tax. Code § 2187.  
20 It contends that it is entitled to summary adjudication of this  
21 issue which goes to priority only and does not assert that the  
22 existence of the Real Property Tax Lien renders the Lenders' liens  
23 invalid. The Court will grant the Committee's request for a  
24 summary adjudication that the Real Property Tax Lien is senior to  
25 any liens on the Real Property asserted by the Lenders.

26 **6. Relative Priority of GECC's and Lenders' Liens on Debtor's  
Grid Flooring and Other Fixtures**

1       The Committee notes that GECC, as successor in interest to  
2 Phoenixcor, Inc., asserts a secured claim of \$155,805.25, secured  
3 by a first priority security interest in certain fixtures: i.e.,  
4 the components in the grid flooring in the Debtor's electroplating  
5 facility, one HYDRO-MYSER Chiller, two W.W. Grainger Regenerative  
6 Blowers, two Tri-Mar Exhaust Blowers, and one Hydromatrix 786 IX  
7 40 GPM System. This security interest was perfected by filing  
8 UCC-1 financing statements with the California Secretary of  
9 State's Office. The Committee contends that the Lenders' liens on  
10 these fixtures are junior to GECC's lien. The Committee contends  
11 that the grid flooring is essential to the operation of the  
12 Debtor's business. Thus, without a senior lien on these items,  
13 the Lenders do not have a "blanket lien" on the Debtor's assets.  
14

15       In response, the Lenders concede that GECC's lien on certain  
16 fixtures is senior to the liens created by the recordation of  
17 their deeds of trust. However, they contend that the Committee's  
18 comments concerning the necessity of the grid flooring to the  
19 Debtor's business are unsupported by any evidence submitted in  
20 support of the Committee's Motion. In reply, the Committee asks  
21 the Court to summarily adjudicate only that GECC's lien on the  
22 grid flooring and other fixtures is senior to the Lenders' liens.  
23 The Court will grant this request.

24       **7. Burlingame Funding's Assertion of a "Blanket Lien"**

25       The Committee notes that the Lenders have continually asserted  
26 that they hold "blanket liens" on the Debtor's assets. The  
Lenders now admit that they do not have a perfected lien on the

1 Debtor's bank accounts and delivery vehicles. In addition,  
2 Burlingame Funding admits that it has filed lien releases with  
3 respect to the Released Equipment. The Committee contends that  
4 the Debtor's business may not be operated without these items so  
5 that the Court should summarily adjudicate that the Lenders do not  
6 hold a "blanket lien" on the Debtor's assets.

7 The Lenders respond that the Court has already held that  
8 Burlingame Funding has a "blanket lien" on the Debtor's assets.  
9 They contend that the Court previously held that, even if the  
10 Lenders do not have a lien on the Released Equipment, this would  
11 only require a reduction in the value of Burlingame Funding's  
12 interest. In reply, the Committee describes in some detail the  
13 nature and function of the Released Equipment and its necessity to  
14 the business operations.

15 The Committee's request for summary adjudication of this issue  
16 is denied. The issue of whether the Lenders have a "blanket lien"  
17 on the Debtor's property is really an issue of whether the value  
18 of the Lenders' liens may be based on the Debtor's going concern  
19 business value. Thus, the issue is whether the Lenders' liens are  
20 sufficient to permit it, when foreclosing, to maintain the  
21 business operations without a significant break.

22 The Court previously made a ruling on this issue. However,  
23 it cannot recall the specifics of the ruling. The ruling may have  
24 been made orally on the record but the Court cannot locate it on  
25 the docket. There does not appear to have been a written  
26 memorandum of decision addressing this issue. The Court's best

1 recollection is that, in that context, the Lenders cited a Ninth  
2 Circuit Court of Appeals case compelling the conclusion that the  
3 Lenders hold "blanket liens" provided the liens reach all  
4 essential assets of the Debtor. Based on that authority, the  
5 Court believes that it ruled that assets that could easily be  
6 replaced, such as delivery trucks, would not disqualify the  
7 Lenders' liens as "blanket liens." The Court would include in the  
8 category of easily replaceable assets the funds in the Debtor's  
9 deposit accounts (assuming the Lenders cannot trace those funds  
10 back to their collateral).

11 However, the Released Equipment presents a more complicated  
12 question. To the extent the Released Equipment is leased  
13 equipment covered by "true leases" subject to the Lenders' liens,  
14 the Lenders' failure to hold liens against the Released Equipment  
15 would not disqualify their liens from being characterized as  
16 "blanket liens." To the extent any of the Released Equipment not  
17 covered by "true leases" has become a "fixture" and thus part of  
18 the Real Property, in which the Lenders hold a security interest,  
19 the Lenders' failure to hold liens against the Released Equipment  
20 would also not disqualify their liens from being characterized as  
21 "blanket liens."

22 However, if any of the Released Equipment that is essential  
23 to the Debtor's business and is not easily replaced is not the  
24 subject of a "true lease" and has not become a fixture and thus  
25 part of the Real Property, the Lenders' failure to hold liens on  
26

1 that equipment may deprive them of their claim to a "blanket  
2 lien."<sup>5</sup>

3 **8. Is Lost Note Unenforceable?**

4 The Committee seeks a summary adjudication, declaring that  
5 Burlingame Funding cannot enforce the Lost Note. The Court  
6 declines to grant this request due to several issues which have  
7 not been adequately addressed, as noted below.

8 The Committee bases its request primarily on Cal. Comm. Code  
9 § 3309(a) which provides that, if the original promissory note  
10 has been lost, only a person who had possession of the note when  
11 it was lost can enforce it.<sup>6</sup> It is undisputed that neither of the  
12 Lenders ever received the Lost Note from Comerica. In addition to  
13 the plain language of § 3309(a), Committee cites Dennis Joslin  
14 Co., L.L.C. v. Robinson Broadcasting Corp., 977 F. Supp. 491

15  
16 \_\_\_\_\_  
17 <sup>5</sup>In their reply, the Committee contended for the first time  
18 that the Lenders could not create a "blanket lien" by combining  
19 their liens. Because this argument was raised first in the  
20 Committee's reply, the Lenders have not had an opportunity to  
respond to it. Therefore, the Court will not consider it at  
this time.

21 <sup>6</sup>Section 3309(a) of the California Commercial Code provides  
22 that: "A person not in possession of an instrument is entitled  
23 to enforce the instrument if (1) the person was in possession of  
the instrument and entitled to enforce it when loss of  
24 possession occurred, (2) the loss of possession was not the  
result of a transfer by the person or a lawful seizure, and (3)  
25 the person cannot reasonably obtain possession of the instrument  
because the instrument was destroyed, its whereabouts cannot be  
determined, or it is in the wrongful possession of an unknown  
26 person or a person that cannot be found or is not amenable to  
service of process."

1 (D.D.C. 1997) and State St. Bank & Trust Co. v. Lord, 851 So. 2d  
2 790 (Fla. Dist. Ct. App. 4<sup>th</sup> Dist. 2003).<sup>7</sup>

3 In Joslin, the plaintiff was the assignee of a note by a  
4 holder that had lost the note prior to the assignment. The Joslin  
5 court held that, under the plain language of the statute, the  
6 plaintiff did not qualify as a person who could enforce the note.  
7 In Lord, the plaintiff was the assignee of a mortgagee that was  
8 unable to establish that either it or the assignor mortgagee had  
9 ever had possession of the original promissory note. Following  
10 Joslin, the Lord court held that the plaintiff could not enforce  
11 the note.

12 Burlingame Funding responds that Cal. Comm. Code § 3309 only  
13 applies to negotiable instruments and that the Lost Note was not  
14 a negotiable instrument. Cal. Comm. Code § 3104 defines a  
15 "negotiable instrument" as one that makes an unconditional promise  
16 to pay a fixed amount of money on demand or at a definite time  
17 and, with limited exceptions, does not require the obligor to do  
18 anything other than pay the amount specified. Burlingame Funding  
19 contends that the Lost Note is "tied" to a "matrix of ...  
20

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21  
22 <sup>7</sup>Contra Nat'l Loan Investors, L.P. v. Joymar Assocs., 767  
23 So. 2d 549 (Fla. Dist. Ct. App. 2000) and YYY Corp. v. Gazda,  
24 761 A.2d 395 (N.H. 2000). The Committee acknowledges that there  
25 are other cases that do not follow Joslin. However, the  
26 Committee contends that these cases are "readily  
distinguishable." The Committee also cites Cadle Co. of Conn.  
v. Messick, 2001 Conn. Super. LEXIS 1752, 45 U.C.C. Rep. Serv.  
2d (CBC) 563 (Conn. Super. Ct. 2001), an unpublished case, the  
subsequent history of which the Committee acknowledges cannot be  
verified.

1       covenants ... and undertakings" such that the Lost Note cannot  
2       qualify as a negotiable instrument. For example, the Lost Note  
3       provides that the Debtor's breach of any other agreement with  
4       Comerica triggers a default and the right to accelerate the debt.  
5       Thus, according to Burlingame Funding, the Lost Note is not a  
6       negotiable instrument and thus not subject to Cal. Comm. Code §  
7       3309.

8       The Court is willing to summarily adjudicate that Article 3  
9       of the California Commercial Code, including § 3309, only applies  
10      to negotiable instruments. However, it is unable to summarily  
11      adjudicate that the Lost Note is a negotiable instrument because  
12      the copy of the Lost Note that has been provided to the Court is  
13      illegible.<sup>8</sup>

14      Next, Burlingame Funding contends that, even if the Lost Note  
15      is a negotiable instrument, it is entitled to enforce the note.  
16      Burlingame Funding argues that the Court should disregard the  
17      plain language of the statute and the case authority cited by the  
18      Committee. It asserts that other courts have construed § 3309(a)  
19      to permit an assignee to enforce a promissory note that was lost  
20      prior to its assignment. In support of this contention,  
21      Burlingame Funding cites, among other cases, In re Caddo Parish-  
22      Villas South, Ltd., 250 F.3d 300 (5<sup>th</sup> Cir. 2001).

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25      <sup>8</sup>From what the Court has been able to read, however, it  
26      appears likely that the Lost Note is a negotiable instrument and  
      thus subject to § 3309.

1       In Caddo Parish-Villas, the debtor objected to a secured claim  
2 by Beal Bank made pursuant to a mortgage note acquired from the  
3 Department of Housing and Urban Development ("HUD"). The original  
4 of the note had been lost by HUD prior to the assignment. Like  
5 the Committee, the debtor relied on the plain language of the  
6 Louisiana version of UCC § 3309(a), which was identical to the  
7 Cal. Comm. Code § 3309(a). The Caddo Parish-Villas court affirmed  
8 the lower court's order, overruling the objection. It noted that  
9 § 1-103 of the Louisiana UCC stated that, in the absence of a  
10 specific provision, the other laws of the state apply. (Section  
11 1103 of the California Commercial Code contains the same  
12 provision.)

13       The Caddo Parish-Villas court noted that Louisiana law  
14 provides that all rights may be assigned, except those that are  
15 strictly personal, and that a failure by the assignor to deliver  
16 all documents in its possession evidencing the assigned rights  
17 does not affect the validity of the assignment. Caddo Parish-  
18 Villas, 250 F.3d at 301-2. As a result, the court concluded that  
19 the assignee could enforce the assigned note as long as it  
20 presented sufficient evidence to establish that HUD was in  
21 possession of the note when the loss occurred. Id. at 302.

22       The parties have not addressed the issue of whether California  
23 law would permit the assignment of a right to enforce a lost  
24 negotiable instrument. However, even if California law would  
25 permit the assignment of the right to enforce a lost note,  
26 evidence must be presented that Comerica qualified as a person

1 entitled to enforce the Lost Note pursuant to Cal. Comm. Code §  
2 3309(a) when the note was lost. This evidence has not yet been  
3 provided.

4 Burlingame Funding also notes that the Official Comment to UCC  
5 § 9-109 contains the following statement, repudiating Joslin:

6 [T]he right under Section 3-309 to enforce a  
7 lost, destroyed or stolen negotiable  
8 promissory note may be sold to a purchaser who  
9 could enforce that right by causing the seller  
10 to provide the proof required under that  
11 section. This Article rejects decisions reach  
12 a contrary result, e.g. Dennis Joslin Co. v.  
13 Robinson Broadcasting, 977 F. Supp. 491  
(D.D.C. 1997).

14 The significance of this comment is unclear. It is puzzling why  
15 this comment is placed in Article 9, rather than Article 3.<sup>9</sup>

16 The Court is not certain that the comment is relevant at all.  
17 It has been unable to determine when the comment was written.  
18 Section 3-309(a) of the Uniform Commercial Code was amended in  
19 2002 to state that a person not in possession of an instrument is  
20 entitled to enforce it if the person acquired the instrument,  
21 either directly or indirectly, from a person who was entitled to  
22 enforce the instrument when loss of possession occurred...."  
23 However, California has not adopted the amended form of UCC § 3-  
24 309(a). Although the comment quoted above is included in the  
25 annotated California Code, it may have been referring to UCC § 3-

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26 <sup>9</sup>Section 9109 is part of Article 9 of the California  
Commercial Code which deals with secured transactions. It  
describes the types of transactions to which Article 9 applies.  
Included in the list is the sale of promissory notes. See Cal.  
Comm. Code § 9109(a)(3).

1 309(a), as amended but not adopted by California. The Court seeks  
2 further guidance from the parties on this issue.  
3

4 In any event, the Court is not certain that the necessary  
5 result of the conclusion that Burlingame Funding is not entitled  
6 to enforce the Lost Note is that Burlingame Funding is not  
7 entitled to payment of its claim. The result may simply be that  
8 Burlingame Funding is required to present evidence to prove its  
9 claim.<sup>10</sup>  
10

11 **9. Will Burlingame Funding Be Unable To Establish the  
12 Amount of its Claim Under Revolving Note?**

13 The Committee notes that Burlingame Funding filed a proof of  
14 claim on or about April 30, 2004 (the "Burlingame Funding Proof of  
15 Claim"), alleging a secured claim against the Debtor on the  
16 petition date in the principal amount of \$2,520,054.18 plus unpaid  
17 interest of \$32,194.82. It observes that the Burlingame Funding  
18 Proof of Claim does not specify the amounts owed under each of the  
19 four promissory notes acquired from Comerica (via Burlingame).  
20 Neither does it specify which claims are secured by personal  
21 property and which by real property. In addition, although it  
22 includes a claim for attorneys' fees and costs, it does not  
23 identify the amount of attorneys' fees and costs incurred as of  
24

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25 <sup>10</sup>The introduction of a promissory note in evidence relieves  
26 the plaintiff of this burden, at least as an initial matter,  
because it establishes a *prima facie* right to recover according  
to the terms of the note. Saks v. Charity Mission Baptist  
Church, 90 Cal. App. 4<sup>th</sup> 1116, 1133 (2001). This issue has not  
been addressed by the parties.

1 the petition date, either in the aggregate or on a note-by-note  
2 basis.

3 The Committee points out that Rule 3001(c) of the Federal  
4 Rules of Bankruptcy Procedure requires either the original or a  
5 duplicate of any writing upon which the claim is based to be filed  
6 with the proof of claim. If the writing has been lost or  
7 destroyed, a statement of the circumstances of the loss or  
8 destruction must be filed with the claim in instead. Rule 3001(d)  
9 provides that, if a security interest is claimed, the proof of  
10 claim must be accompanied by evidence of perfection of the  
11 security interest.

12 The Committee contends that Burlingame Funding has failed to  
13 comply with either of these provisions. As a result, it contends,  
14 the Burlingame Funding Proof of Claim is not entitled to be  
15 considered *prima facie* evidence of Burlingame Funding's claim. As  
16 a consequence, Burlingame Funding must come forward with  
17 sufficient evidence to prove its claim. Remington Investments,  
18 Inc. v. Moussa Nikbakht Hamedani, 55 Cal. App. 4<sup>th</sup> 1033, 1041  
19 (1997).

20 The Committee notes that one of the principals of Burlingame  
21 Funding, Robert Judson ("Judson"), recently signed a declaration  
22 stating the amounts purportedly owed under the four notes  
23 previously held by Comerica and now held by Burlingame Funding.  
24 Although the principal amount was the same as the amount set forth  
25 in the Burlingame Funding Proof of Claim, the interest figure was  
26 different. There is no explanation for the variance. Moreover,

1 the declaration does not break down the amounts owed on a note by  
2 note basis either. The Committee asserts that it does not  
3 appear that Judson has sufficient personal knowledge of the  
4 amounts due under the notes to provide the required evidence.  
5 Burlingame Funding has been unable to provide the Committee with  
6 any business records demonstrating the advances or payments under  
7 the Lost Note or Revolving Note. The Committee also contends that  
8 Burlingame Funding cannot rely on the Debtor's books and records  
9 to establish the amount of the debt. Burlingame Funding has  
10 alleged that those books and records are inaccurate, and the  
11 Debtor has admitted that they are.

12 In response, Burlingame Funding acknowledges that it is  
13 required to establish the amount of its claim. It expresses the  
14 belief that Comerica has the necessary records and claims to have  
15 recently subpoenaed them. However, it expresses doubt that the  
16 Debtor's records are so inaccurate that they would be insufficient  
17 to establish the amounts owed if Comerica no longer has the  
18 necessary records. It opposes summary adjudication of this issue  
19 until it has a chance to complete its discovery.

20 In another adversary proceeding in this case, the Court has  
21 already concluded that the form of the Burlingame Funding Proof of  
22 Claim is inadequate to establish a *prima facie* case in support of  
23 its claim. Consequently, consistent with that ruling, the Court  
24 grants the Committee's request to summarily adjudicate that  
25 Burlingame Funding has both the burden of producing sufficient  
26 evidence to establish its claim against the estate and the

1 collateral securing it as well as the burden of persuasion on  
2 those issues.

3 **10. Will Burlingame Be Unable To Establish Amount of Its Claim?**

5 The Committee notes that Burlingame also filed a proof of  
6 claim on or about April 30, 2004 (the "Burlingame Proof of  
7 Claim"). The Burlingame Proof of Claim asserted an amount due of  
8 \$3,047,836.215 plus attorneys' fees and costs. Like the  
9 Burlingame Funding Proof of Claim, the Burlingame Proof of Claim  
10 failed to comply with Rule 3001(c) & (d) by attaching a copy of  
11 the writing upon which the claim was based and proof of perfection  
12 of the security interest. Thus, according to the Committee, the  
13 Burlingame Proof of Claim is not entitled to be treated as prima  
14 facie evidence of the claim's validity either. In re Consolidated  
15 Pioneer Mortgage, 178 B.R. 222, 226-27 (Bankr. 9<sup>th</sup> Cir. 1995). The  
16 Committee contends that, like Burlingame Funding, Burlingame must  
17 come forward with its own evidence establishing the amount of its  
18 claim and, as discussed above, cannot rely on the Debtor's books  
19 and records to do so.

20 Burlingame responds that it has produced sufficient evidence  
21 of its advances to the Debtor and of the payments received from  
22 the Debtor. If more evidence is required, it intends to obtain  
23 that evidence from the Debtor. In reply, the Committee states  
24 that there is no competent evidence to establish the amount of  
25 Burlingame's claim. Moreover, the Debtor has made over \$100,000  
26 in post-petition payments to Burlingame for which no credit has

1       been applied. As noted above, the Debtor's pre-petition records  
2       are unreliable, and the Lenders have said as much in documents  
3       filed with the Court.

4       The Court grants the Committee's request to summarily  
5       adjudicate that Burlingame is required to prove its claim and may  
6       not rely on the Burlingame Proof of Claim to establish a prima  
7       facie case in support of its claim. The Court denies the  
8       Committee's request to summarily adjudicate that Burlingame is  
9       unable to prove its claim. Burlingame does not appear to seek  
10       summary adjudication of the amount of its claim. However, if it  
11       had, the Court would deny that request as well. The Court is  
12       unable to determine from what has been filed to date the validity  
13       and amount of Burlingame's claim as a matter of law.

14       **11. Whether Burlingame's Secured Claim Is Undersecured.**

15       Finally, the Committee contends that, based on the value of  
16       the Debtor's assets and the amount of Burlingame Funding's likely  
17       claim, Burlingame's claim is undersecured. As a result,  
18       Burlingame is not entitled to recover its post-petition interest,  
19       costs, or attorneys' fees. In its response, Burlingame concedes  
20       that its claim is undersecured. In reply, the Committee asks the  
21       Court to summarily adjudicate this issue. The Court will grant  
22       this request.<sup>11</sup>

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24       <sup>11</sup>In its opposition to the Lenders' cross-motion, the  
25       Committee asks the Court to summarily adjudicate that Burlingame  
26       Funding's secured claim is also undersecured. This request is  
      procedurally improper and, on that basis, the Court declines to  
      grant it. Moreover, the Court does not believe that there is a

1                   **B. LENDERS' CROSS-MOTION**

2                   The Lenders' Cross-Motion seeks summary adjudication of the  
3 following additional issues:<sup>12</sup>

4                   1. Whether the Comerica Deed of Trust's designation of the  
5 Debtor's predecessor in interest as the debtor prevents Burlingame  
6 Funding from enforcing the lien against the Debtor.

7                   2. Whether Burlingame Funding's failure to record the  
8 assignment of the Comerica Deed of Trust until after the petition  
9 date prevents Burlingame Funding from enforcing it.

10                  3. Whether the form of the Debtor's name on the UCC-1  
11 financing statements renders them unenforceable.

12                  4. Whether the Debtor's failure to sign an amendment to the  
13 UCC-1 financing statement renders it unenforceable.

14                  5. Whether the failure to check the box in Item 9 of the UCC-  
15 1 financing statement amendment invalidates the amendment.

16                  6. Whether Fred Koelling's signature was sufficient to bind  
17 the Partnership.

18                  7. Whether Fred Koelling's signature was sufficient to bind  
19 the Debtor.

20                  \_\_\_\_\_  
21 sufficient evidentiary basis at present for it to make such a  
22 determination.

23                  <sup>12</sup>The Lenders note that many of the Committee's allegations  
24 with respect to alleged defects in Burlingame Funding's security  
25 documents are also made with respect to Burlingame's security  
26 documents. Although in their arguments, for the most part, they  
only refer to the claims against Burlingame Funding, they note  
that the same arguments apply to Burlingame and thus are not  
repeated. To the extent the issues are identical, the Court's  
rulings are also identical.

1       8. Whether there is any evidence to support the Committee's  
2 allegation that the Burlingame Deed of Trust was altered after it  
3 was executed by the Debtor.

4       9. Whether the interest rate on the Burlingame Deed of Trust  
5 was usurious.

6       **1. Comerica Deed of Trust's Designation of the Partnership as**  
7       **Debtor**

8       In paragraph 17 of the Complaint, the Committee contends that  
9 Burlingame Funding's security interest in the fixtures located on  
10 the Real Property (the "Fixtures") is unperfected and thus  
11 avoidable under 11 U.S.C. § 544(a)(1). It bases this argument on  
12 the fact that the Comerica Deed of Trust, upon which Burlingame  
13 Funding relies for its security interest in the Fixtures (the  
14 "Fixture Deed of Trust"), names the Partnership, rather than the  
15 Debtor, as the debtor.<sup>13</sup>

Burlingame Funding seeks a

16 summary adjudication that this claim has no merit. It notes that,  
17 when the Comerica Deed of Trust was executed and recorded, the  
18 Partnership owned the Fixtures and the recordation of the Comerica  
19 Deed of Trust perfected Comerica's security interest in the  
20 Fixtures. It contends that the transfer of the Fixtures by the  
21 Partnership to the Debtor did not require any additional filing,  
22 naming the Debtor as debtor, to maintain the perfected status of  
23 the security interest, at least as to those fixtures existing at

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24  
25  
26       <sup>13</sup>The Debtor is a separate entity from the Partnership, not  
simply a change in its form. The Debtor acquired its assets  
from the Partnership.

1 the time of the transfer or acquired by the Debtor within four  
2 months. The Court agrees.

3 Section 9502 of the California Commercial Code provides, in  
4 pertinent part, as follows:

5 (a) Subject to subdivision (b), a  
6 financing statement is sufficient only if it  
7 satisfies all of the following conditions:

8 (1) It provides the name  
9 of the debtor. (2) It provides the  
name of the secured party or a representative  
of the secured party. (3) It indicates  
the collateral covered by the financing  
statement.

10 (b) Except as otherwise provided in  
11 subdivision (b) of Section 9501, to be  
12 sufficient, a financing statement ... which is  
13 filed as a fixture filing and covers goods  
14 that are or are to become fixtures, must  
15 satisfy subdivision (a) and also satisfy all  
16 of the following conditions:

17 (1) Indicate that it covers this type of  
18 collateral.

19 (2) Indicate that it is to be recorded in  
20 the real property records.

21 (3) Provide a description of the real  
22 property to which the collateral is related  
23 sufficient to give constructive notice of a  
mortgage under the law of this state if the  
description were contained in a record of the  
mortgage of the real property.

24 (4) If the debtor does not have an  
interest in the real property, provide the  
name of the record owner.

25 (c) A record of a mortgage is effective, from  
26 the date of recording, as a financing  
statement filed as a fixture filing ... only  
if all of the following conditions are  
satisfied:

27 (1) The record indicates the goods or  
28 accounts that it covers.

29 (2) The goods are or are to become  
30 fixtures related to the real property  
described in the record....

31 (3) The record  
32 satisfies the requirements for a financing

1 statement in this section other than an  
2 indication that it is to be filed in the real  
3 property records.

4 (4) The record is duly recorded.

5 Pursuant to these provisions, the Comerica Deed of Trust qualified  
6 as a "fixture filing" financing statement at the time it was  
7 recorded. The Committee does not appear to contend otherwise.  
8 Thus, the only question is whether anything was required to be  
9 filed when the Real Property and Fixtures were transferred by the  
10 Partnership to the Debtor to maintain the perfected status of  
Comerica's security interest.<sup>14</sup>

11 Burlingame Funding contends that nothing further had to be  
12 filed to maintain Comerica's perfected security interest after the  
13 Real Property and Fixtures were transferred to the Debtor,  
14 including as to fixtures acquired by the Debtor within four months  
15 after the transfer. In support of this position, it cites Cal.  
16 Comm. Code § 9508. Section 9508 provides, in pertinent part,  
17 as follows:

18 (a) Except as otherwise provided in this  
19 section, a filed financing statement naming an  
original debtor is effective to perfect a

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20 <sup>14</sup>The Committee does not appear to contend, at least in this  
21 context, that Comerica's transfer of its security interest to  
Burlingame and Burlingame's transfer to Burlingame Funding  
22 caused the security interest, if perfected, to become  
unperfected. See also Cal. Comm. Code § 9310(c)(no additional  
23 filing is required to continue the perfected status of a  
security interest if a secured party assigns a perfected  
24 security interest). Moreover, because the fixture financing  
statement is contained in a deed of trust, Comerica was not  
25 required to file a continuation statement to continue the  
perfected status of its security interest. See Cal. Comm. Code  
26 § 9515(g).

1 security interest in collateral in which a new  
2 debtor<sup>15</sup> has or acquires rights to the extent  
3 that the financing statement would have been  
4 effective had the original debtor acquired  
5 rights in the collateral.

6 (b) If the difference between the name of the  
7 original debtor and that of the new debtor  
8 causes a filed financing statement that is  
9 effective under subdivision (a) to be  
10 seriously misleading<sup>16</sup> under Section 9506, the  
11 following rules apply:

12 (1) The financing statement is effective  
13 to perfect a security interest in collateral  
14 acquired by the new debtor before, and within  
15 four months after, the new debtor becomes  
16 bound under subdivision (d) of Section 9203.

17 (2) The financing statement is not  
18 effective to perfect a security interest in  
19 collateral acquired by the new debtor more  
20 than four months after the new debtor becomes  
21 bound under subdivision (d) of Section 9203  
22 unless an initial financing statement  
23 providing the name of the new debtor is filed  
24 before the expiration of that time.

25 The Court agrees with Burlingame Funding that the effect of Cal.  
26 Comm. Code § 9508 is that the security interest in the Fixtures  
perfected by Comerica by recording the Comerica Deed of Trust

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15 The term "new debtor" is defined as "a person that becomes bo  
16 as debtor under subdivision (d) of Section 9203 by a security agree  
17 previously entered into by another person. See Cal. Comm. Code §  
18 9102(a)(56). At or about the time the Real Property and Fixtures w  
19 transferred to the Debtor, the Debtor executed an agreement pursuan  
20 which it assumed the Partnership's obligations to Comerica (the  
21 "Assumption Agreement"). The Assumption Agreement was recorded in  
22 November 2001. Thus, the Debtor qualifies as a "new debtor" for  
23 purposes of Cal. Comm. Code § 9508(a).

16 For purposes of Division 9 of the California Commercial  
Code, the name of a new debtor is seriously misleading if a  
search of the records of the filing office under the original  
debtor's name, using the filing office's standard search logic,  
if any, would not disclose the financing statement. See Cal.  
Comm. Code § 9506(c).

1 continued after the Real Property and Fixtures were transferred to  
2 the Debtor as to any fixtures on the Real Property prior to the  
3 transfer or acquired by the Debtor within four months after the  
4 transfer.<sup>17</sup>

5 Finally, the priorities established by Cal. Comm. Code §  
6 9334(e) prevent a trustee or debtor-in-possession to avoid  
7 Burlingame Funding's security interest in the Fixtures, exercising  
8 the rights of a hypothetical judicial lien creditor whose lien  
9 attached as of the bankruptcy petition date. Section 9334(e)  
10 provides as follows:

11 (e) A perfected security interest in  
12 fixtures has priority over a conflicting  
13 interest of an encumbrancer...of the real  
14 property if:

15 (1) The debtor has an interest of record  
16 in the real property...and both of the  
17 following conditions are satisfied:

18 (A) The security interest is  
19 perfected by a fixture filing before the  
20 interest of the encumbrancer...is of record.

21 (B) The security  
22 interest has priority over any conflicting  
23 interest of a predecessor in title of the  
24 encumbrancer....

25 The security interest asserted by Burlingame Funding was perfected  
26 before the Debtor's bankruptcy petition date and would have

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27 <sup>17</sup>Burlingame Funding implicitly concedes that the Fixture  
28 Deed of Trust would not give it a perfected security interest in  
29 fixtures acquired by the Debtor more than four months after  
30 Koelling-McNeill's transfer of the Real Property and Fixtures to  
31 the Debtor. There is no evidence that the Debtor acquired any  
32 fixtures more than four months after the Real Property and  
33 Fixtures were transferred to it. Absent such evidence, the  
34 Court declines to address whether Burlingame Funding would have  
35 a perfected security interest in any such fixtures.

1 priority over any conflicting interest of a predecessor to the  
2 judicial lien creditor. Thus, Burlingame Funding is entitled to  
3 a summary adjudication that it has a perfected security interest  
4 in the Fixtures to the extent the Fixtures were acquired before or  
5 within four months of the transfer of the Real Property to the  
6 Debtor.

7 **2. Burlingame Funding's Failure To Record Assignment of Comerica  
8 Deed of Trust**

9 Paragraph 19 of the Complaint alleges that Burlingame  
10 Funding's security interest in the Fixtures and in the Debtor's  
11 personal property is unperfected because no assignment of the  
12 security interest was filed or recorded before the Debtor's  
13 bankruptcy petition was filed. Burlingame Funding seeks a summary  
14 adjudication, declaring that these claims are without merit. It  
15 contends that it was not required to file or record an assignment  
16 of Comerica's Deed of Trust or UCC-1 financing statements to  
17 continue the perfection of the security interest in the Fixtures  
18 and the Debtor's personal property. The Court concludes that  
19 Burlingame Funding is entitled to the requested summary  
20 adjudication.

21 In support of its contention that the security interest in the  
22 Fixtures and the Debtor's personal property remained perfected  
23 notwithstanding Burlingame's failure to record assignments of the  
24 security interest prior to the bankruptcy petition date,  
25 Burlingame Funding cites Cal. Civ. Code §§ 2934 and 2936 and Cal.

1 Comm. Code § 9310(c). Cal. Civ. Code § 2934 provides, in  
2 pertinent part, as follows:

3 Any assignment of ... the beneficial interest  
4 under a deed of trust may be recorded, and  
5 from the time the same is filed for record  
operates as constructive notice of the  
contents thereof to all persons....

6 Cal. Civ. Code § 2936 provides that "[t]he assignment of a debt  
7 secured by mortgage carries with it the security." Cal. Comm.  
8 Code § 9310(c) provides that:

9 If a secured party assigns a perfected  
10 security interest..., a filing under this  
11 division is not required to continue the  
perfected status of the security interest  
against creditors of and transferees from the  
12 original debtor.

13 Burlingame Funding contends that there is no dispute that the  
14 Debtor's debt to Comerica was assigned to Burlingame, that  
15 Burlingame assigned it to Burlingame Funding, or that Comerica's  
16 security interest in the Fixtures and the Debtor's personal  
17 property was properly perfected before the debt was assigned.  
18 Therefore, according to Burlingame Funding, as a result of the  
19 assignment of the debt, it holds a perfected security interest in  
20 the Fixtures and in the Debtor's personal property notwithstanding  
21 its failure to file or record an assignment of the security  
22 interest. It notes that Cal. Civ. Code § 2934 uses the word  
23 "may." Thus, recording an assignment of the beneficial interest  
24 of a deed of trust is optional, not mandatory.

25 The Committee reads Cal. Civ. Code § 2934 as implying, if not  
26 expressly stating, that recordation of an assignment of a deed of

1 trust is required to perfect the security interest of the  
2 assignee. This argument would have merit if the dispute were with  
3 another purported assignee of Comerica who recorded its assignment  
4 first. As noted above, Cal. Civ. Code § 2934 states that, if the  
5 assignment is recorded, it operates as constructive notice to all  
6 persons of its contents from the date of recordation. However, a  
7 transferee of the Real Property (as opposed to a subsequent  
8 assignee of Comerica's security interest) would still have  
9 constructive notice of Comerica's perfected security interest in  
10 the Real Property. The fact that the transferee would not have  
11 constructive notice that Comerica had assigned that security  
12 interest to a third party would not render the security interest  
13 unperfected.

14 The Committee agrees that, pursuant to Cal. Comm. Code  
15 § 9310(c), an assignment of a perfected security interest by the  
16 "original debtor" need not be filed to continue the perfection of  
17 a security interest in personal property. However, it asserts  
18 that this provision only protects the assignment by Comerica to  
19 Burlingame. According to the Committee, § 9310(c) does not  
20 protect the assignment by Burlingame to Burlingame Funding  
21 because, according to the Committee, the Debtor does not qualify  
22 as an "original debtor." At least with respect to the first  
23 financing statement, according to the Committee, the Partnership  
24 was the "original debtor."

25 This contention has no merit. Section 9102(a)(60) of the  
26 California Commercial Code defines a "new debtor" as a "person

1 that, as debtor, entered into a security agreement to which a new  
2 debtor has become bound under subdivision (d) of Section 9203."  
3 However, it expressly states that this definition does not apply  
4 to the use of the phrase "new debtor" in Section 9310(c).

5 As discussed above, Cal. Comm. Code § 9508(a) provides that  
6 a perfected security interest in personal property remains  
7 perfected when a new debtor acquires rights in the collateral.  
8 Section 9508(b)(1) provides that, even if the new debtor becomes  
9 bound by the security agreement, the perfected security interest  
10 attaches to collateral acquired for four months after the  
11 transfer. Thereafter, a new financing statement naming the new  
12 debtor is required. In fact, after the Partnership transferred  
13 its assets to the Debtor and the Debtor assumed the Partnership's  
14 debts to Comerica, on December 6, 2001, Comerica filed an  
15 amendment to the first financing statement, changing the debtor's  
16 name from the Koelling-McNeill Partnership to Qmect, Inc.  
17

18 The Committee also contends that when, in 2003, Comerica Bank-  
19 California, a California banking corporation, the "original  
20 debtor," merged into Comerica Bank, a Michigan corporation, it was  
21 required to record an assignment of the security interest  
22 reflected in any UCC-1 financing statements previously filed with  
23 respect to the Debtor's personal property. In support of this  
24  
25  
26

1 contention, it cites In re Copper King Inn, Inc., 918 F.2d 1404,  
2 1407-09 (9<sup>th</sup> Cir. 1990). No such assignment was recorded.<sup>18</sup>

3 The Court finds Copper King distinguishable. In Copper King,  
4 the secured creditor was not listed on the financing statement at  
5 all. The parties listed as the secured creditors were officers,  
6 directors, and shareholders of the debtor. Id., at 1405. The  
7 Copper King court rejected the argument that inquiries could have  
8 been made to these individuals who would have clarified who was  
9 the true secured creditor. It noted that there was no guarantee  
10 that these insiders would have provided accurate information given  
11 their incentive to provide misinformation. Id. at 1408.

12 The Copper King court distinguished In re Wilco Forest  
13 Machinery, Inc., 491 F.2d 1041 (5<sup>th</sup> Cir. 1974), in which the  
14 validity of a financing statement was upheld although the secured  
15 creditor had merged into a separate corporation prior to the  
16 bankruptcy of the debtor and the financing statement had not been  
17 amended to reflect the change. The merger of Comerica Bank-

18The Committee also asserts that, although the failure to  
record an assignment of the deed of trust after the merger and  
resulting name change did not render Comerica's security  
interest in the Fixtures and Real Property unperfected, it did  
prevent Comerica and its successors in interest from foreclosing  
on its collateral nonjudicially. See Miller & Starr, California  
Real Estate, 3<sup>rd</sup> ed., Deeds of Trust, 10:39, citing Cal. Civ.  
Code § 2932.5 (assignee of debt secured by deed of trust  
acquires power to sell nonjudicially only if assignment is duly  
acknowledged and recorded). Burlingame Funding responds that it  
is not seeking a determination that it is entitled to foreclose  
on its collateral nonjudicially.

1 California into Comerica Bank falls within the holding of Wilco  
2 Forest rather than that of Copper King.  
3

4 Finally, the Committee acknowledges that Burlingame Funding  
5 filed an assignment of the Comerica Deed of Trust one week after  
6 the Debtor's bankruptcy petition was filed. However, the  
7 Committee contends that this post-petition recordation of the  
8 assignment violated the automatic stay and was thus void.  
9 Burlingame Funding responds that the Committee cites no authority  
10 for its contention that the post-petition recordation of the  
11 assignment of the Comerica Deed of Trust violated the automatic  
12 stay.

13 The Court concludes that the Committee is in error in its  
14 assertion that the recordation of the assignment post-petition  
15 violated the automatic stay. The recordation of the assignment  
16 was not attempt to create, perfect, or enforce a lien against the  
17 Real Property. It did not diminish the estate in any way; it  
18 simply substituted one secured party for another. See In re  
19 Patton, 314 B.R. 826, 834 (Bankr. D. Kan. 2004); In re Citicorp  
20 Park Assocs., 173 B.R. 823 (Bankr. D. Me. 1994).

21 **3. Form of Debtor's Name on UCC-1 Financing Statements**

22 Paragraphs 20 and 22 of the Complaint allege that Burlingame  
23 Funding's security interest in the the Debtor's personal property  
24 is unperfected because, as of the petition date, the UCC-1  
25 financing statements on file with the California Secretary of  
26 State's Office named the Partnership, rather than the Debtor, as  
the debtor. Thus, according to the Committee, they were seriously

1 misleading. In its motion for summary adjudication, Burlingame  
2 Funding seeks a determination that this claim has no merit.  
3 Burlingame Funding notes that amendments to the financing  
4 statements were filed changing the debtor's name to Qmect, Inc.  
5 Copies of the amendments are attached as Exhibit U7 to the Request  
6 for Judicial Notice in support of its motion.

7 In any event, Burlingame Funding argues, because the security  
8 interest was perfected prior to the sale of the Debtor's personal  
9 property by the Partnership to the Debtor, the security interest  
10 remained perfected notwithstanding the sale. In support of this  
11 contention, it cites Cal. Comm. Code §§ 9507(a) and 9315(a)(1).  
12 Section 9507(a) provides that:

13 A filed financing statement remains effective  
14 with respect to collateral that is sold,  
15 exchanged, leased, licensed, or otherwise  
16 disposed of and in which a security interest  
... continues, even if the secured party knows  
of or consents to the disposition.

17 Section 9315(a)(1) provides that:

18 Except as otherwise provided in this division  
19 and in subdivision (2) of Section 2403, ...  
20 (1) A security interest ... continues in  
21 collateral notwithstanding sale ... or other  
disposition thereof unless the secured party  
authorized the disposition free of the  
security interest ....

22 In addition, Burlingame Funding contends, the financing  
23 statements were sufficient to perfect a security interest in  
24 personal property acquired by the Debtor to the same extent they  
25 would have been effective if the Partnership had acquired the  
26 personal property. In support of this contention, Burlingame

1 Funding cites Cal. Comm. Code § 9508(a). Section 9508(a) provides  
2 that:

3       Except as otherwise provided in this section,  
4 a filed financing statement naming an original  
5 debtor is effective to perfect a security  
6 interest in collateral in which a new debtor  
7 has or acquires rights to the extent that the  
financing statement would have been effective  
had the original debtor acquired rights in the  
collateral.

8 If a creditor could not identify the new debtor as the owner of  
9 the collateral using the standard search logic of the recording  
10 office, the secured creditor's rights are limited to collateral  
11 obtained by the new debtor within four months after its  
12 acquisition of the original debtor's personal property collateral.

13 See Cal. Comm. Code §§ 9506 & 9508(b). However, Burlingame  
14 Funding argues that, because it filed an amended financing  
15 statement less than four months after the Debtor obtained the  
16 collateral from the Partnership, changing the name of the debtor  
17 from Koelling-McNeill Partnership to Qmect, Inc., its security  
18 interest is not limited to personal property acquired by the  
19 Debtor within four months of the transfer.

20       The Committee responds that Burlingame Funding has misread its  
21 allegations. It contends that the Complaint does not allege that  
22 Burlingame Funding's security interest in the Debtor's personal  
23 property is unperfected because the Debtor's name on the financing  
24 statements is incorrect. The Complaint alleges that certain of  
25 the financing statements did not state the correct name and  
26 address of the secured party or the correct address of the Debtor

1 and that the names and addresses that were stated on those  
2 financing statements were seriously misleading.

3 As a result, the Complaint claims, Burlingame Funding's  
4 security interest in the Debtor's personal property is unperfected  
5 and avoidable under 11 U.S.C. § 544(a)(1). Since Burlingame  
6 Funding has failed to address these allegations, according to the  
7 Committee, its request for summary adjudication with respect to  
8 the allegations contained in paragraphs 20 and 22 should be  
9 denied.

10 Burlingame Funding responds that, if the allegations are that  
11 its security interest in the Debtor's personal property is  
12 unperfected because, as of the bankruptcy petition date, the  
13 financing statement failed to name Burlingame as the secured party  
14 or to provide Burlingame's address, the claim should still be  
15 summarily adjudicated as having no merit. It bases this argument  
16 on Cal. Comm. Code § 9310. As noted above, § 9310(c) provides  
17 that:

18 If a secured party assigns a perfected  
19 security interest..., a filing under this  
20 division is not required to continue the  
21 perfected status of the security interest  
against creditors of and transferees from the  
original debtor.

22 Regardless of the merits of this response, because it was  
23 raised for the first time in Burlingame Funding's reply, the Court  
24 will not consider it at this time. The Committee is correct that  
25 Burlingame Funding's original argument mischaracterizes the  
26 allegations of paragraphs 20 and 22. By addressing the true

1 allegations of those paragraphs for the first time in its reply,  
2 Burlingame Funding has deprived the Committee of its opportunity  
3 to respond to its only relevant argument.

4. **Debtor's Failure To Sign Amendments to UCC-1 Financing  
5 Statements** Paragraph 21 of the Complaint alleges, among other  
6 things, that Financing Statement Amendment No. 01341C0773  
7 ("Amendment to Financing Statement 177"), which purports to amend  
8 Financing Statement No. 9703160177 ("Financing Statement 177"), is  
9 invalid because it is not signed by the Debtor. Similarly,  
10 paragraph 23 of the Complaint alleges, among other things, that  
11 Financing Statement Amendment No. 02161C0287 ("Amendment to  
12 Financing Statement 476"), which purports to amend Financing  
13 Statement No. 9430760476 ("Financing Statement 476"), is invalid  
14 because it is not signed by the Debtor.

15 Burlingame Funding seeks a summary adjudication, declaring  
16 that this claim has no merit. It asserts that a debtor's  
17 signature is no longer required on either the original financing  
18 statement or an amendment thereto. In support of this  
19 proposition, it cites Cal. Comm. Code §§ 9502(a) and 9509(b).  
20 Section 9502(a) provides, in pertinent part, that:

21 ... a financing statement is sufficient only  
22 if it satisfies all of the following  
23 conditions: (1) It provides the name of  
the debtor. (2) It provides the name  
of the secured party ....  
24 (3) It indicates the  
collateral covered by the financing statement.

25  
26 Section 9509(b) provides that:

1 By authenticating or becoming bound as debtor  
2 by a security agreement, a debtor or new  
3 debtor authorizes the filing of an initial  
4 financing statement, and an amendment,  
5 covering both of the following:

6 (1) The collateral  
7 described in the security agreement.

8 (2) Property  
9 that becomes collateral under paragraph (2) of  
10 subdivision (a) of Section 9315, whether or  
11 not the security agreement expressly covers  
12 proceeds.

13 Burlingame Funding notes that there is not even a signature line  
14 for the debtor on the official amendment form.

15 The Committee responds that it does not contend that the  
16 Debtor had to sign the financing statements or amendments thereto.  
17 This is not precisely true. As noted above, one of the defects  
18 alleged by the Committee in paragraph 21 and 23 is the Debtor's  
19 failure to sign the amendments. However, apparently, the  
20 Committee has abandoned this allegation. Therefore, Burlingame  
21 Funding is entitled to a summary adjudication of this issue.

22

23 **5. Failure To Check Box or To Provide Name and Address of New  
24 Debtor in Item 9 of the Amendments**

25 Paragraph 21 of the Complaint also alleges that Financing  
26 Statement 177 is invalid because it does not name the Debtor as  
the debtor<sup>19</sup> and that the Amendment to Financing Statement 177,  
which purports to add the name of the Debtor in place of the name  
of the Partnership, contains Comerica's name instead of the

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27  
28 <sup>19</sup>This financing statement was filed on January 28, 1997,  
29 before the Debtor was formed. It names the Partnership as the  
30 debtor.

1 Debtor's in Item 9a. It alleges that Financing Statement 177 is  
2 also invalid because the box in Item 9a is not checked indicating  
3 that the amendment reflects the addition of a debtor or the  
4 addition or deletion of collateral rather than the assignment of  
5 the security interest. Paragraph 23 of the Complaint alleges that  
6 the Amendment to Financing Statement 476 is invalid for the same  
7 reasons as the Amendment to Financing Statement 177.

8 Burlingame Funding seeks a summary adjudication that the  
9 amendments are valid and effective to perfect its security  
10 interest in the described collateral, including personal property  
11 acquired thereafter by the Debtor. First, it contends that it was  
12 not required to check the box in Item 9a or to enter the Debtor's  
13 name in Item 9a. It asserts that this box only applies to  
14 amendments filed *solely* under the authority of the Debtor. In  
15 support of this argument, it relies on a paragraph from the  
16 Instructions for National UCC Financing Statement AMENDMENT (Form  
17 UCC3) (the "UCC Form Instructions"). It contends that the  
18 amendments at issue here were not filed *solely* under the authority  
19 of the Debtor. This argument has no merit. The language quoted  
20 from the UCC Form Instructions does not use the word "solely,"  
21 only the word "authorized." Burlingame Funding does not contend  
22 that the Debtor did not authorize the filing of the amendments.

23  
24 Next, Burlingame Funding contends that it properly completed  
25 the two amendments. It notes that the purpose of the Amendment to  
26 Financing Statement 177 was to change the name the debtor: i.e.,

1 from the Koelling-McNeill Partnership to Qmect, Inc. It states  
2 that the UCC Form Instructions advise the person completing an  
3 amendment form for this purpose to: (1) check the box in Item 5 to  
4 indicate that the amendment amends information relating to the  
5 debtor, (2) check the box in Item 5 to indicate that the amendment  
6 is a name change, (3) enter in Item 6 the prior name of the  
7 debtor, and (4) enter in Item 7 the new name of the debtor. It  
8 states that it complied with these instructions.

9 Similarly, the purpose of the Amendment to Financing Statement  
10 476 was to add collateral. The UCC Form Instructions advise the  
11 person completing an amendment for this purpose to describe the  
12 change in Item 8, either by describing the collateral to be added  
13 or deleted or by setting forth in full the collateral as amended,  
14 and to check the appropriate box indicating the method of  
15 description chosen. Burlingame Funding contends that it also  
16 complied with these instructions. Therefore, it seeks a summary  
17 adjudication that the amendments were valid and effective to  
18 perfect and to continue the perfection of its perfected security  
19 interest in the Debtor's personal property.

20 The Committee disagrees with this contention. It argues that  
21 the instructions for an amendment designed to reflect a mere name  
22 change for an existing debtor did not apply here. The Debtor was  
23 a new debtor. Qmect, Inc. was not just a new name for the  
24 original debtor: i.e., the Koelling-McNeill Partnership, changed  
25 to a corporate form. Under these circumstances, the Committee  
26 contends, it was necessary to check the boxes in both Items 5 and

9 and to enter the new debtor's name in Item 9a. Burlingame  
Funding replies that, even if the Committee is correct, the defect  
was not sufficient to invalidate the amendments. It notes that  
Cal. Comm. Code § 9506(a) provides that:

A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

The Court is not sufficiently clear on the law governing these issues to summarily adjudicate them at this time. It agrees with the Committee that, if it was appropriate to file an amendment to an existing financing statement to perfect a security interest in the personal property of a new debtor and in any event with respect to the new description of collateral, the box in Item 9 should have been checked and the name of Qmect, Inc. should have been entered in both amendments. However, the Court agrees with Burlingame Funding that the failure to do so would not invalidate the amendments because it did not render them seriously misleading. The boxes checked in Item 5 and the entry of the Debtor's name in Item 7 was sufficient to permit the public records to reflect the correct name of the new debtor. While the Debtor's name does not appear anywhere on the Amendment to Financing Statement 476, the Amendment does clearly indicate that it is amending Financing Statement 476. Financing Statement 476 does contain the Debtor's name.

Rather, the Court's uncertainty turns on whether a new initial financing statement should not have been filed to perfect a

1 security interest in collateral subsequently acquired by the  
2 Debtor more than four months after it acquired its assets from the  
3 Partnership. Clearly, under Cal. Comm. Code § 9508(a), with  
4 respect to the personal property collateral acquired by the Debtor  
5 from the Partnership, the existing perfected security interest  
6 continued notwithstanding the transfer of ownership. Under Cal.  
7 Comm. Code § 9508(a), the security interest would also attach  
8 and be perfected with respect to any personal property of the type  
9 described as collateral in the existing financing statement  
10 acquired by the Debtor within four months after the Debtor's  
11 became bound by the Partnership's security agreement with  
12 Comerica.

13 However, Cal. Comm. Code § 9508(b)(2) provides that, unless  
14 the difference in the names of the old and new debtor would not be  
15 seriously misleading, the existing financing statement is not  
16 effective to perfect a security interest in collateral acquired by  
17 a new debtor more than four months after the new debtor becomes  
18 bound under the security agreement unless an "initial financing  
19 statement" providing the name of the new debtor is filed before  
20 the expiration of the four months. An amendment to an existing  
21 financing statement would not appear to qualify as an "initial  
22 financing statement." As a result, Burlingame Funding's perfected  
23 security interest would appear to be limited to the personal  
24 property collateral transferred to it by the Partnership and any  
25 personal property within the collateral description acquired by  
26 the Debtor during the four months after it signed the Assumption

1       Agreement. However, these statutes are sufficiently complex that  
2       the Court declines to make a ruling on these issues at this time  
3       without further briefing and argument by the parties.<sup>20</sup>

4       **6. Sufficiency of Fred Koelling's Signature To Bind the**  
5       **Partnership**

6       Paragraph 26 of the Complaint alleges that the Comerica Deed  
7       of Trust was signed only by Fred Koelling, not by all of the  
8       general partners of the Partnership. It alleges that Fred  
9       Koelling may not have been authorized by a resolution signed by  
10       all the general partners to sign the Comerica Deed of Trust on the  
11       Partnership's behalf. As a result, the Complaint alleges, the  
12       Comerica Deed of Trust may be invalid.

13       Burlingame Funding seeks summary adjudication of this claim,  
14       declaring that the Comerica Deed of Trust may not be invalidated  
15       on this ground. It contends that, even if it is established that  
16       Fred Koelling did not have authority to bind the Partnership, the  
17       Comerica Deed of Trust would still be valid unless it is proven

18  
19       

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<sup>20</sup>In its opposition to the motion, the Committee also  
20       contends that Cal. Comm. Code § 9326(a) subordinates Burlingame  
21       Funding's perfected security interest in at least some of the  
22       Debtor's personal property to the security interests of certain  
23       hypothetical secured creditors. As a result, it contends that,  
24       to that extent, the security interest is subject to avoidance  
25       pursuant to 11 U.S.C. § 544(a)(1). The allegations of  
26       paragraphs 21 and 23 do not assert this claim, and Burlingame  
Funding does not seek summary adjudication of it. As a result,  
the Court will not make any ruling with respect to it. However,  
the Court expresses doubt as to whether the holder of a security  
interest created by a new debtor which is perfected by filing a  
financing statement would qualify as the holder of a judicial  
lien within the meaning of 11 U.S.C. § 544(a)(1).

1 either that Comerica was aware of Fred Koelling's lack of  
2 authority at the time the Comerica Deed of Trust was signed or  
3 that the Comerica Deed of Trust was not executed for the apparent  
4 purpose of carrying on the business of the partnership in the  
5 ordinary course. In support of this proposition, Burlingame  
6 Funding cites Cal. Corp. Code § 16301 which provides as follows:  
7

8 (1) Each partner is an agent of the  
9 partnership for the purpose of its business.  
10 An act of a partner, including the execution  
11 of an instrument in the partnership name, for  
12 apparently carrying on in the ordinary course  
13 the partnership business or business of the  
kind carried on by the partnership binds the  
partnership, unless the partner had no  
authority to act for the partnership in the  
particular matter and the person with whom the  
partner was dealing knew or had received  
notification that the partner lacked  
authority.

14 (2) An act of  
15 a partner that is not apparently for carrying  
16 on in the ordinary course of the partnership  
business or business of the kind carried on by  
the partnership binds the partnership only if  
the act was authorized by the other partners.

17 In response, the Committee notes that it did not seek summary  
18 adjudication of this issue. Therefore, it is not obliged at this  
19 time to prove that Fred Koelling lacked authority to bind the  
20 Partnership to the Comerica Deed of Trust. To the contrary, the  
21 Committee contends that it is Burlingame Funding's burden to  
22 present evidence that Fred Koelling did have authority to sign the  
23 Comerica Deed of Trust or that signing the Comerica Deed of Trust  
24 was in the ordinary course of business of the Partnership. The  
25 Committee points out that Burlingame Funding has presented no  
26 evidence in support of either of these propositions.

1       The Committee contends that execution of a deed of trust with  
2 respect to all of a partnership's real property is clearly not  
3 within the ordinary course of the partnership's business.  
4 According to the Committee, this is precisely the type of  
5 transaction that requires approval of all general partners. See  
6 Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes,  
7 Ltd., 12 Cal. App. 4<sup>th</sup> 74, 93 (1993)(partner not authorized to bind  
8 partnership to guaranty without specific authority, at least  
9 implied from the previous course of dealing between the parties).  
10 The Committee asserts that no prudent lender would accept a deed  
11 of trust executed by one partner on behalf of a partnership  
12 without an authorizing resolution signed by the other partners.  
13

14       Burlingame Funding responds that, because it has sought a  
15 summary adjudication of this issue, if it wishes to oppose this  
16 request, the Committee is required to present evidence that Fred  
17 Koelling was not authorized to sign the Comerica Deed of Trust.  
18 In support of this contention, Burlingame Funding cites Anderson  
19 v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986). See also  
20 Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

21       The Court concludes that Burlingame Funding is entitled to  
22 summary adjudication that Fred Koelling's signature alone on the  
23 Comerica Deed of Trust was sufficient to bind the Partnership. As  
24 noted above, Cal. Corp. Code § 16301 provides that a partner may  
25 bind the partnership by any act in the ordinary course of business  
26 of the partnership, including the execution of an instrument,

1 unless the person with whom the partner was dealing knew that the  
2 partner lacked authority. In its motion, Burlingame Funding did  
3 not squarely contend that Fred Koelling had express authority from  
4 the other partners of the Partnership to execute the Comerica Deed  
5 of Trust. Therefore, to resist summary adjudication of this  
6 issue, the Committee was not compelled to present evidence that he  
7 lacked express authority.

8 However, Burlingame Funding did squarely put at issue whether  
9 execution of the Comerica Deed of Trust was in the ordinary course  
10 of the Partnership's business and whether Comerica had notice that  
11 Fred Koelling lacked authority to sign the Comerica Deed of Trust  
12 on behalf of the Partnership. The Committee treated the first  
13 issue as a legal issue and cited authority to support its  
14 contention that executing a deed of trust was not an ordinary  
15 course transaction. It presented no evidence as to the latter  
16 factual issue.

17 The Court concludes that the execution of the Comerica Deed  
18 of Trust was within the ordinary course of the Partnership's  
19 business. The meaning of the phrase "ordinary course" in this  
20 context is not the same as its meaning in a bankruptcy context.  
21 The execution of a deed of trust encumbering all the real property  
22 of a chapter 11 bankruptcy debtor would clearly not be viewed as  
23 in the ordinary course of business. However, in the nonbankrupt  
24 commercial world, the phrase is much less restrictive.<sup>21</sup> A

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26 <sup>21</sup>The case cited by the Committee is clearly  
distinguishable. In Tsakos, after a limited partnership had

1 transaction is in the ordinary course of a partnership's business  
2 if the purpose of the transaction is to carry on the business of  
3 the partnership. The execution of the Comerica Deed of Trust  
4 clearly qualifies within that broader definition.<sup>22</sup>

5 **7. Sufficiency of Fred Koelling's Signature To Bind Debtor**

6 Paragraph 27 of the Complaint alleges, on information and  
7 belief, that any promissory note, security agreement, or other  
8 loan document not signed by two corporate officers of the Debtor  
9 and not authorized by a valid resolution of the Debtor's Board of  
10 Directors does not bind the Debtor. It alleges that the following

11  
12 \_\_\_\_\_  
13 been dissolved by agreement of the partners, a general partner  
14 borrowed money for his own benefit and signed a document  
15 purporting to bind the partnership to a guaranty of the loan.  
16 The Tsakos court noted that, even before dissolution, a guaranty  
17 of the debt of a third party would not normally be viewed as in  
18 the ordinary course of a partnership's business. Tsakos, 12  
19 Cal. App. 4<sup>th</sup> at 93. By contrast, in Owens v. Palos Verdes  
20 Monaco, 142 Cal. App. 3d 855, 866-67 (1983), the court held that  
21 the sale of a partnership's sole asset was within its ordinary  
22 course of business where the purpose of the partnership was to  
23 sell the asset. Here, the Fixtures Deed of Trust was part of  
24 the transaction by which Koelling-McNeill obtained the funds  
25 necessary to its business operations. It is difficult to see  
26 how this transaction could be viewed as outside the  
partnership's ordinary course of business.

22 Burlingame Funding also asserts that the Debtor should be  
23 estopped from denying its obligations pursuant to the Fixtures  
24 Deed of Trust after having accepted the benefits of the loans  
25 secured by it. See Nygard v. Dickinson, 97 F.2d 53, 57 (9<sup>th</sup> Cir.  
26 1938) (knowledge of work done and accepting its benefits may  
estop principal from denying authority of agent to contract for  
it on principal's behalf); Cowan v. Tremble, 111 Cal. App. 458  
(1931). Because the Court concludes that Burlingame Funding is  
entitled to summary adjudication of this issue for other  
reasons, the Court need not address this ground.

1 documents executed by the Debtor in favor of Comerica fail for  
2 this reason: (1) the Agreement Supplementing Deed of Trust, dated  
3 November 5, 2001, (2) the Assumption/Modification Agreement, dated  
4 November 8, 2001, (3) the Business Loan Agreement, dated April 24,  
5 2002, and (4) the Security Agreement, dated April 24, 2004.

6 Burlingame Funding seeks summary adjudication of this issue,  
7 declaring it to have no merit as a matter of law. It notes that  
8 Cal. Corp. Code § 208(b) provides that "any contract...made in the  
9 name of a corporation" binds the corporation if it is: (1)  
10 "authorized or ratified by the board," (2) "done within the scope  
11 of the authority, actual or apparent, conferred by the board," or  
12 (3) "within the agency power of the officer executing it...."  
13 Burlingame Funding notes that it has in its possession copies of  
14 corporate resolutions and certifications signed by the Koellings,  
15 identifying Fred Koelling as the Debtor's president, with  
16 authority to contract for the Debtor. Moreover, it argues  
17 that, even without these corporate resolutions, the Court should  
18 find and conclude that it was within Fred Koelling's apparent or  
19 implied authority to execute these contracts. See Memorial  
20 Hospital Assoc. Of Stanislaus County v. Pacific Grape Prods. Co.,  
21 45 Cal. 2d 634, 637 (1955) (corporation's president/manager had  
22 implied power to execute pledge agreement).

23 The Committee responds that, for a contract to be binding on  
24 a corporation, it must be either: (1) authorized by a resolution  
25 of the Board of Directors or (2) signed by both: (a) the president  
26 or a vice-president and (b) the secretary or the treasurer. In

1 support of this contention, it cites Snukal v. Flightways Mfg., 23  
2 Cal. 4th 754 (2000)<sup>23</sup> and Cal. Corp. Code § 313.<sup>24</sup> To date, the  
3 Committee notes, Burlingame Funding has not produced competent  
4 evidence of a corporate resolution authorizing Fred Koelling to  
5 sign the specified documents. The copies of the resolutions  
6 produced by Burlingame Funding are either unsigned or relate to  
7 other lending transactions. In addition, they are merely attached  
8 to the declaration of Janice Judson, who the Committee contends is  
9 not competent to authenticate them.

10 Moreover, the Committee asserts that, even if such corporate  
11 resolutions exist and are properly authenticated, they would be  
12 invalid. A corporation must have three directors if it has at  
13 least three shareholders. See Cal. Corp. Code § 212(a). The  
14 Debtor has always had three shareholders. However, the Debtor  
15 appears to have had only two directors when the contracts  
16 specified in paragraph 27 of the Complaint were signed. Because  
17

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18 <sup>23</sup>The Committee's citation was incorrect. The Court assumes  
19 that the Committee meant to provide the Supreme Court citation  
20 rather than the lower appellate court citation, particularly  
21 since the year provided in the Committee's citation was the year  
of the Supreme Court decision, not that of the lower court  
decision.

22 <sup>24</sup>Section 313 provides, in pertinent part, that "any ...  
23 contract ... executed ... between any corporation and any other  
24 person, when signed by ... the president ... and the secretary,  
any assistant secretary, the chief financial officer or any  
assistant treasurer of such corporation, is not invalidated as  
25 to the corporation by any lack of authority of the signing  
officers in the absence of actual knowledge on the part of the  
26 other person that the signing officers had no authority to  
execute the same." Cal. Corp. Code § 313.

1 it was improperly constituted, the Committee reasons, the Board  
2 did not have authority to elect Fred Koelling as President of the  
3 Debtor. Therefore, Fred Koelling had no authority to contract for  
4 the Debtor.

5 Finally, the Committee contends that the case law with respect  
6 to apparent and implied corporate authority is conflicting. In  
7 support of this contention, it cites two purported conflicting  
8 decisions: i.e., Citizens' Securities Co. v. Hammel, 14 Cal. App.  
9 564 (1910) and McKiernan v. Lenzen, 56 Cal. 61, 64 (1880). The  
10 Committee asserts that, to a large degree, this case law has been  
11 supplanted by Cal. Corp. Code § 313. For this reason, the  
12 Committee argues that determining whether Fred Koelling had the  
13 apparent authority to bind the Debtor with respect to the  
14 specified contracts should await an evidentiary hearing.

15 In reply, Burlingame Funding contends that the Court should  
16 summarily adjudicate that the contracts bind the Debtor because:  
17 (1) it was within Fred Koelling's apparent authority to sign them  
18 on the Debtor's behalf; see Mem'l Hosp. Assoc. of Stanislaus  
19 County v. Pacific Grape Prods. Co. 45 Cal. 2d 634 (1955); Snukal  
20 v. Flightways Mfg., Inc. 23 Cal. 4<sup>th</sup> 754 (2000); and (2) the Debtor  
21 should be estopped from contending that it is not bound by them  
22 after having accepted the benefits of the contracts; see Nygard v.  
23 Dickinson, 97 F.2d 53, 57 (9<sup>th</sup> Cir. 1938); Cowan v. Tremble, 111  
24 Cal. App. 458 (1931).

25 The Court concludes that Burlingame Funding is entitled to  
26 summary adjudication of this issue. The Committee may be correct

1 that Burlingame Funding cannot rely on Cal. Corp. Code § 313 to  
2 establish that the contracts bind the Debtor. Clearly, the sole  
3 signature of Fred Koelling, the Debtor's president, was not  
4 sufficient to give rise to the conclusive presumption of authority  
5 created by Cal. Corp. Code § 313. If the Debtor's Board was  
6 improperly constituted, as it appears to have been, any corporate  
7 resolution adopted by it may have been invalid.

8 However, Cal. Corp. Code § 313 is not the only means by which  
9 it can be established that a contract executed by a corporate  
10 officer binds the corporation. As noted in Snukal, "Corporations  
11 Code section 313 leaves intact the other party's ability to assert  
12 the validity of an instrument under existing common law doctrines  
13 when the signatory or signatories do not hold the corporate  
14 offices specified in that statute." Snukal, 23 Cal. 4<sup>th</sup> at 783.<sup>25</sup>

15 The cases cited by the Committee for its contention that the  
16 law governing apparent authority is conflicting are not  
17 particularly persuasive, if for no other reason than their age.  
18 More current case authority clearly establishes that "[w]here the

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20       <sup>25</sup>In Snukal, an individual who was the president, secretary,  
21 and treasurer for a corporation leased a private residence in  
22 the name of the corporation. When he defaulted on the rent, the  
23 lessor sued the corporation for the debt. The corporation  
24 defended on the ground that the board of directors had not  
25 authorized the individual to enter into the lease. It contended  
26 that Cal. Corp. Code § 313 did not apply because the individual  
indicated only his office as president when he signed the lease.  
It also contended that to gain the conclusive presumption of  
authority granted by section 313, the lease had to have been  
signed by two individuals holding the offices specified. Snukal, 23  
Cal. 4<sup>th</sup> at 776-87.

1 president of a corporation is also its general manager, having the  
2 power to superintend and conduct its business, he has implied  
3 authority to make any contract or do any other act appropriate in  
4 the ordinary course of its business." Mem'l Hosp., 45 Cal. 2d at  
5 637. As discussed with respect to the preceding issue, ordinary  
6 course should not be understood in the same sense that it is used  
7 by the Bankruptcy Code. The Court views contracts executed with  
8 a corporation's primary lender to enable the corporation to obtain  
9 the operating capital required for its business to be in the  
10 ordinary course of the corporation's business.

11 Moreover, the Court agrees that the Debtor is estopped from  
12 denying that it is bound by the contracts after having accepted  
13 the loans and used the funds. See McGirr v. Gulf Oil Corp., 41  
14 Cal. App. 3d 246, 257 (1974)(principal was estopped from asserting  
15 agent's lack of authority to enter into real estate contract where  
16 principal had had complete knowledge of the circumstances and had  
17 accepted the benefits of the contract).

18 **8. Was Burlingame's Deed of Trust Altered After Its Execution?**

19 Paragraphs 34 of the Complaint alleges, on information and  
20 belief, that the Burlingame Deed of Trust was altered after it was  
21 executed by the Debtor and is therefore invalid. Paragraph 35  
22 alleges, on information and belief, that the acknowledgement of  
23 the Burlingame Deed of Trust is incorrect, inadequate and/or  
24 altered and is therefore invalid. Paragraph 36 alleges that  
25 certain of the alleged advances upon which Burlingame's claims are  
26

1 based were not actually made to or for the benefit of the Debtor  
2 and thus do not constitute valid debts of the Debtor.  
3

4 Burlingame asks that these claims be "disregarded" or  
5 "stripped" from the complaint. It views them as allegations of  
6 fraud which must be stated with particularity. See Fed. R. Civ.  
7 Proc. 9(b); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9<sup>th</sup>  
8 Cir. 2003). Burlingame Funding makes the same request with  
9 respect to the allegations in paragraph 28: i.e., that the  
10 acknowledgements of the Agreement Supplementing Deed of Trust and  
11 the Assumption/Modification Agreement, both of which were executed  
12 by the Debtor in favor of Comerica, are incorrect and/or  
13 inadequate and are therefore invalid, unenforceable and/or  
14 avoidable.

15 The Committee responds that Rule 9(b) is irrelevant as the  
16 paragraphs in question contain no allegations of fraud. Moreover,  
17 it asserts that a challenge based on Rule 9(b) is properly raised  
18 by a motion to strike, not a motion for summary judgment. If  
19 granted, the Committee is entitled to leave to amend to state its  
20 claim with more specificity. In reply, Burlingame argues that  
21 summary judgment should be granted because, once again, the  
22 Committee has failed to provide any evidence that the Burlingame  
23 Deed of Trust or any of the related documents were altered after  
24 they were signed. It contends that it challenged this allegation  
25 in its countermotion for summary judgment. Moreover, it disagrees  
26 with the Committee's contention that the allegations do not assert  
fraud.

1       The Court agrees with the Committee that the allegations in  
2 paragraphs 28, 34, 35, and 36 do not assert claims of fraud or  
3 fraudulent conduct. There is no allegation that any alteration  
4 was made with the intent to deceive. Therefore, Rule 9(b) of the  
5 Federal Rules of Civil Procedure does not apply.

6       If Burlingame and Burlingame Funding were correct that, in  
7 their counter-motion, they had asserted that the documents were  
8 not altered, they would be entitled to a summary adjudication with  
9 respect to this issue given the Committee's failure to produce any  
10 evidence that they were altered. As discussed above, the  
11 Committee would have had the burden of producing evidence of  
12 alteration. However, Burlingame and Burlingame Funding do not  
13 cite the page of their counter-motion on which they make this  
14 assertion, and the Court has been unable to locate it. Therefore,  
15 the request for summary adjudication of this issue will be denied.  
16

17       **9. Was Interest Rate on Burlingame's Deed of Trust Usurious?**

18       Paragraph 37 of the Complaint alleges, on information and  
19 belief, that certain of the debts upon which Burlingame's claims  
20 are based include usurious interest or unconscionable charges and  
21 are therefore unenforceable. The California Constitution imposes  
22 a cap on the interest rate that entities may charge on loans.  
23 However, certain lenders are exempt from its provisions. See Cal.  
24 Fin. Code § 22002.

25       In its motion, Burlingame asserts that is a "certified  
26 lender," licensed by the California Department of Corporations and

1 thus exempt from the usury law. See Cal. Fin. Code § 22002. It  
2 asks the Court to summarily adjudicate this claim in its favor.  
3 The Committee responds that the burden is on the Burlingame to  
4 establish the right to an exemption from usury laws. See Cal.  
5 Fin. Code § 22053. To do so, Burlingame must prove that it was  
6 licensed when the loan was made, that the loan was made from its  
7 licensed place of business (or the borrower requested that it be  
8 made at some other location), and (iii) that the lender's license  
9 was prominently posted at its licensed place of business. Cal.  
10 Fin. Code §§ 22151 & 22155. Burlingame has only provided evidence  
11 that Burlingame held a license at the time it made the loan to the  
12 Debtor. It has not offered any evidence on the other two points.  
13

14 In reply, Burlingame argues that its right to the exemption  
15 is created by the California Constitution. According to  
16 Burlingame, §§ 22151 and 22155 are regulatory in nature, and the  
17 failure to satisfy them does not result in a forfeiture of the  
18 lender's right to claim the exemption. It does not cite any  
19 authority for this contention.<sup>26</sup>  
20

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21 <sup>26</sup>Burlingame also contends that the burden is on the  
22 Committee, as the party opposing summary adjudication, to  
23 produce evidence that the loans made Burlingame did not comply  
24 with the second two requirements: i.e., that the loan was made  
25 from Burlingame's licensed place of business (unless the Debtor  
26 requested that it be made elsewhere) and that the license was  
prominently posted at that place of business. The Court is  
unwilling to grant summary adjudication of this issue on this  
ground for two reasons. First, the argument was raised for the  
first time in Burlingame's reply. As a result, the Committee  
has not had an opportunity to reply to it. Second, it is not

1           Article XV, section 1, of the California Constitution  
2 establishes a limit on the rate of interest that may be charged on  
3 loans or forbearances of "any money, goods or things in action, or  
4 on accounts after demand...." However, it provides an exemption  
5 from this limitation for certain types of lenders: e.g., banks,  
6 credit unions, pawnbrokers. Included in the list of exempt  
7 lenders is the catchall phrase "or any other class of persons  
8 authorized by statute...." Cal. Const., art. XV, sec. 1.  
9 Burlingame does not fit into any of the specified categories of  
10 lenders. Thus, any right to an exemption from the usury  
11 limitations on the interest rate it can charge is created by  
12 statute: i.e., the California Finance Code.

13           The statute upon which Burlingame relies for its exemption is  
14 the California Finance Lenders Law, Cal. Fin. Code § 22000 et seq.  
15 The statute contains four articles: Article 1 Definitions,  
16 beginning with section 22000, Article 2 Exemptions, beginning with  
17 section 22050, Article 3 Licensing, beginning with section 22100,  
18 and Article 4 Regulations, beginning with section 22150. Section  
19 22002, which is contained in Article 1, provides that the statute  
20 creates a class of exempt persons pursuant to Section 1 of Article  
21 XV of the California Constitution." Section 22009, also contained  
22

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23 clear to the Court that it is an element of a plaintiff's claim  
24 for usury. It seems more likely that the defendant must assert  
25 that it is exempt as a defense to a usury claim. A plaintiff  
26 should not be required to produce evidence to counter a defense  
asserted by a defendant to resist a motion for summary  
adjudication. The parties have not addressed these issues.  
Therefore, summary adjudication on this ground is inappropriate.

1 in Article 1, defines "finance lender" to include any person  
2 engaged in making commercial loans.

3 The primary thrust of Article 2 is to specify those persons  
4 and transactions to which the statute does not apply. Section  
5 22050(e), which is contained in this article, provides that the  
6 statute does not apply to commercial lenders which make no more  
7 than one loan in a twelve month period. Neither Burlingame nor  
8 the Committee has discussed whether Burlingame is removed from  
9 coverage by the statute pursuant to this provision or the effect  
10 of that removal. Section 22053, which is also contained in  
11 Article 2, states that the burden of proving an exemption is upon  
12 the person claiming it.

13 Article 3, entitled Licensing, contains section 22100 which  
14 provides, in pertinent part, that "[n]o person shall engage in the  
15 business of a finance lender ... without obtaining a license from  
16 the commissioner. Section 22151 and 22155, the sections primary  
17 relied upon by the Committee, are contained in Article 4, entitled  
18 "Regulations." Section 22151 requires the licensee to display the  
19 license conspicuously in the place of business authorized in its  
20 license. Section 22155 provides that no licensee shall make  
21 commercial loans at any other place of business than that named in  
22 the license unless the borrower requests that it do so.

23 Burlingame does not appear to contend that a borrower could  
24 not assert a claim of usury against an unlicensed finance lender.  
25 Therefore, the fact that a statutory requirement is not contained  
26 in Article 2, entitled "Exemption," should not be determinative of

1 whether its violation gives rise to a private right of action.  
2 Moreover, the fact that §§ 22151 and 22155 appear in an article  
3 entitled "Regulations" is not determinative of the remedy  
4 available for their violation. "Whether a regulatory statute  
5 creates a private right of action depends on legislative intent."  
6 Goehring v. Chapman Univ., 121 Cal. App. 4<sup>th</sup> 353, 375-79  
7 (2004)(statute requiring unaccredited law schools to provide  
8 students with disclosure statements after receiving tuition  
9 payments created private right of action, entitling students to  
10 refund of tuition despite absence of legislative history  
11 indicating intent to create right of private action and absence of  
12 any specific statutory remedy).

13 In determining legislative intent, the first place to look is  
14 at the words of the statute, given their ordinary meaning and  
15 construed in their statutory context. Id. Section 22001 of the  
16 California Financial Code provides that the statute shall be  
17 liberally construed and applied to promote the statute's  
18 underlying purposes. Its underlying purposes include ensuring  
19 "an adequate supply of credit to borrowers[,]" protecting  
20 "borrowers against unfair practices by some lenders, having due  
21 regard for the interests of legitimate and scrupulous lenders[,]"  
22 and permitting and encouraging the development of fair and  
23 economically sound lending practices[.]" Cal. Fin. Code §  
24 22001(a)(1), (4), & (5).

25 Based on these stated purposes, the Court is inclined to  
26 conclude that a violation of §§ 22151 or 22155 does give rise to

1 a private right of action. The requirement that a commercial  
2 lender be licensed does little, by itself, to protect the  
3 borrower. The principal benefit is conferred by the requirement  
4 that the license be posted in the lender's authorized place of  
5 business and that the loan transaction be made there. By this  
6 means, the borrower is put on constructive notice that the lender  
7 is entitled to charge a usurious rate of interest.

8 However, because this issue has not been adequately briefed  
9 and because, as discussed above, Burlingame may not be covered by  
10 the statute at all, the Court will make no ruling on this issue at  
11 this time other than to deny Burlingame's motion for summary  
12 adjudication.

13 **CONCLUSION**

14 **A. Committee's Motion:** The Court summarily adjudicates the  
15 following issues:

16 1. The Lost Note and the Revolving Note are not cross-  
17 collateralized by the Comerica Deed of Trust.

18 2. Burlingame Funding does not have a security interest in  
19 any equipment leased by the Debtor pursuant to "true leases" but  
20 does have a lien on the leases themselves as contract rights.

21 3. Neither of the Lenders has a security interest in the  
22 Debtor's deposit accounts.

23 4. Neither of the Lenders has a security interest in the  
24 Debtor's two delivery trucks.

25 5. The Real Property Tax Lien is senior in priority to any  
26 deeds of trust held by the Lenders on the Real Property.

1       6. GECC's lien on the grid flooring and other fixtures is  
2 senior to the Lenders' deeds of trust on the Real Property.  
3

4       7. Article 3 of the California Commercial Code only applies  
5 to negotiable instruments.  
6

7       8. The Burlingame and Burlingame Funding Proofs of Claim are  
8 inadequate to establish a *prima facie* case in support of their  
9 claims. As a consequence, Burlingame and Burlingame Funding must  
10 present sufficient evidence to prove the validity and amount of  
11 their claims.  
12

13       9. Burlingame's secured claim is undersecured.  
14

15       The Court denies the Committee's request for summary  
16 adjudication of all other issues. Counsel for the Committee  
17 is directed to submit a proposed form of order in accordance with  
18 the Court's rulings.  
19

20       **B. Lenders' Cross-Motion:** The Court summarily adjudicates the  
21 following issues:  
22

23       1. Burlingame Funding has a perfected security interest in  
24 the Fixtures to the extent the Fixtures were acquired before or  
25 within four months of the transfer of the Real Property and  
26 Fixtures to the Debtor.  
27

28       2. Burlingame Funding's failure to record an assignment of  
29 the Comerica Deed of Trust or to file an assignment of the  
30 security interest in the Debtor's personal property did not render  
31 either security interest unperfected.  
32

33       3. The Debtor's failure to sign the Amendments to Financing  
34 Statements 177 and 476 did not render the amendments invalid.  
35

4. Fred Koelling's signature on the Comerica Deed of Trust was sufficient to bind the Partnership.

5. Fred Koelling's signature on the contracts specified in paragraph 27 of the Complaint was sufficient to bind the Debtor.

The Court denies Burlingame's and Burlingame Funding's request for summary adjudication of all other issues. Counsel for Burlingame and Burlingame Funding is directed to submit a proposed form of order in accordance with these rulings.

END OF DOCUMENT

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